

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

RENEE R. DELANEY,

Plaintiff,

v.

CAROLYN W. COLVIN, Acting
Commissioner of Social Security
Administration,

Defendant.

NO: 13-CV-0009-TOR

ORDER GRANTING PLAINTIFF'S
MOTION FOR SUMMARY
JUDGMENT

BEFORE THE COURT are the parties' cross motions for summary judgment (ECF Nos. 13 and 14). Plaintiff is represented by Maureen J. Rosette and Dana C. Madsen. Defendant is represented by Daphne Banay. This matter was submitted for consideration without oral argument. The Court has reviewed the administrative record and the parties' completed briefing and is fully informed. For the reasons discussed below, the Court grants Plaintiff's motion and denies Defendant's motion.

1 JURISDICTION

2 The Court has jurisdiction over this case pursuant to 42 U.S.C. § 405(g);
3 1383(c)(3).

4 STANDARD OF REVIEW

5 A district court's review of a final decision of the Commissioner of Social
6 Security is governed by 42 U.S.C. § 405(g). The scope of review under §405(g) is
7 limited: the Commissioner's decision will be disturbed "only if it is not supported
8 by substantial evidence or is based on legal error." *Hill v. Astrue*, 698 F.3d 1153,
9 1158-59 (9th Cir. 2012) (citing 42 U.S.C. § 405(g)). "Substantial evidence" means
10 relevant evidence that "a reasonable mind might accept as adequate to support a
11 conclusion." *Id.* at 1159 (quotation and citation omitted). Stated differently,
12 substantial evidence equates to "more than a mere scintilla[,] but less than a
13 preponderance." *Id.* (quotation and citation omitted). In determining whether this
14 standard has been satisfied, a reviewing court must consider the entire record as a
15 whole rather than searching for supporting evidence in isolation. *Id.*

16 In reviewing a denial of benefits, a district court may not substitute its
17 judgment for that of the Commissioner. If the evidence in the record "is
18 susceptible to more than one rational interpretation, [the court] must uphold the
19 ALJ's findings if they are supported by inferences reasonably drawn from the
20 record." *Molina v. Astrue*, 674 F.3d 1104, 1111 (9th Cir. 2012). Further, a district

1 court “may not reverse an ALJ’s decision on account of an error that is harmless.”
2 *Id.* at 1111. An error is harmless “where it is inconsequential to the [ALJ’s]
3 ultimate nondisability determination.” *Id.* at 1115 (quotation and citation omitted).
4 The party appealing the ALJ’s decision generally bears the burden of establishing
5 that it was harmed. *Shinseki v. Sanders*, 556 U.S. 396, 409-10 (2009).

6 FIVE-STEP SEQUENTIAL EVALUATION PROCESS

7 A claimant must satisfy two conditions to be considered “disabled” within
8 the meaning of the Social Security Act. First, the claimant must be “unable to
9 engage in any substantial gainful activity by reason of any medically determinable
10 physical or mental impairment which can be expected to result in death or which
11 has lasted or can be expected to last for a continuous period of not less than twelve
12 months.” 42 U.S.C. § 1382c(a)(3)(A). Second, the claimant’s impairment must be
13 “of such severity that he is not only unable to do his previous work[,] but cannot,
14 considering his age, education, and work experience, engage in any other kind of
15 substantial gainful work which exists in the national economy.” 42 U.S.C. §
16 1382c(a)(3)(B).

17 The Commissioner has established a five-step sequential analysis to
18 determine whether a claimant satisfies the above criteria. *See* 20 C.F.R. §§
19 404.1520(a)(4)(i)-(v); 416.920(a)(4)(i)-(v). At step one, the Commissioner
20 considers the claimant’s work activity. 20 C.F.R. §§ 404.1520(a)(4)(i);

1 416.920(a)(4)(i). If the claimant is engaged in “substantial gainful activity,” the
2 Commissioner must find that the claimant is not disabled. 20 C.F.R. §§
3 404.1520(b); 416.920(b).

4 If the claimant is not engaged in substantial gainful activities, the analysis
5 proceeds to step two. At this step, the Commissioner considers the severity of the
6 claimant’s impairment. 20 C.F.R. §§ 404.1520(a)(4)(ii); 416.920(a)(4)(ii). If the
7 claimant suffers from “any impairment or combination of impairments which
8 significantly limits [his or her] physical or mental ability to do basic work
9 activities,” the analysis proceeds to step three. 20 C.F.R. §§ 404.1520(c);
10 416.920(c). If the claimant’s impairment does not satisfy this severity threshold,
11 however, the Commissioner must find that the claimant is not disabled. *Id.*

12 At step three, the Commissioner compares the claimant’s impairment to
13 several impairments recognized by the Commissioner to be so severe as to
14 preclude a person from engaging in substantial gainful activity. 20 C.F.R. §§
15 404.1520(a)(4)(iii); 416.920(a)(4)(iii). If the impairment is as severe or more
16 severe than one of the enumerated impairments, the Commissioner must find the
17 claimant disabled and award benefits. 20 C.F.R. §§ 404.1520(d); 416.920(d).

18 If the severity of the claimant’s impairment does meet or exceed the severity
19 of the enumerated impairments, the Commissioner must pause to assess the
20 claimant’s “residual functional capacity.” Residual functional capacity (“RFC”),

1 defined generally as the claimant's ability to perform physical and mental work
2 activities on a sustained basis despite his or her limitations (20 C.F.R. §§
3 404.1545(a)(1); 416.945(a)(1)), is relevant to both the fourth and fifth steps of the
4 analysis.

5 At step four, the Commissioner considers whether, in view of the claimant's
6 RFC, the claimant is capable of performing work that he or she has performed in
7 the past ("past relevant work"). 20 C.F.R. §§ 404.1520(a)(4)(iv);
8 416.920(a)(4)(iv). If the claimant is capable of performing past relevant work, the
9 Commissioner must find that the claimant is not disabled. 20 C.F.R. §§
10 404.1520(f); 416.920(f). If the claimant is incapable of performing such work, the
11 analysis proceeds to step five.

12 At step five, the Commissioner considers whether, in view of the claimant's
13 RFC, the claimant is capable of performing other work in the national economy.
14 20 C.F.R. §§ 404.1520(a)(4)(v); 416.920(a)(4)(v). In making this determination,
15 the Commissioner must also consider vocational factors such as the claimant's age,
16 education and work experience. *Id.* If the claimant is capable of adjusting to other
17 work, the Commissioner must find that the claimant is not disabled. 20 C.F.R. §§
18 404.1520(g)(1); 416.920(g)(1). If the claimant is not capable of adjusting to other
19 work, the analysis concludes with a finding that the claimant is disabled and is
20 therefore entitled to benefits. *Id.*

1 The claimant bears the burden of proof at steps one through four above.
2 *Lockwood v. Comm’r of Soc. Sec. Admin.*, 616 F.3d 1068, 1071 (9th Cir. 2010). If
3 the analysis proceeds to step five, the burden shifts to the Commissioner to
4 establish that (1) the claimant is capable of performing other work; and (2) such
5 work “exists in significant numbers in the national economy.” 20 C.F.R. §§
6 404.1560(c); 416.960(c)(2); *Beltran v. Astrue*, 700 F.3d 386, 389 (9th Cir. 2012).

7 ALJ’S FINDINGS

8 Plaintiff filed applications for disability insurance benefits and supplemental
9 security income disability benefits on February 9, 2010 and July 27, 2010. Tr.
10 128-29; 130-33. These applications were denied initially and upon
11 reconsideration, and a hearing was requested. Tr. 89-91, 93-95, 96-97, 100-01. A
12 hearing was held before an Administrative Law Judge on August 29, 2011. Tr. 41-
13 85. The ALJ rendered a decision denying Plaintiff benefits on October 3, 2011.
14 Tr. 21-30.

15 The ALJ found that Plaintiff meets the insured status requirements of Title II
16 of the Social Security Act through December 31, 2010. Tr. 23. At step one, the
17 ALJ found that Plaintiff had not engaged in substantial gainful activity since at
18 least August 1, 2006, the alleged onset date, *id.*, even though, at the hearing, the
19 Plaintiff amended her alleged onset date to February 9, 2009. At step two, the ALJ
20 found that Plaintiff had severe impairments, *id.*, but at step three, the ALJ found

1 that Plaintiff's impairments did not meet or medically equal a listed impairment.

2 Tr. 25-26. The ALJ then determined that Plaintiff had the residual functional
3 capacity to:

4 perform light work as defined in 20 C.F.R. 404.1567(b) and
5 416.967(b) with limitations for no unprotected heights/climbing of
6 ladders, ropes, scaffolding; only occasional bending, stooping, and
balancing; and environmental limitations for no wetness, cold
temperatures or vibrations (machinery).

7 Tr. 26-28. At step four, the ALJ found that Plaintiff was able to perform her past
8 relevant work as a receptionist. Tr. 29. The ALJ alternatively made a step five
9 finding that based on the Plaintiff's age, education, work experience, and residual
10 functional capacity, there are other jobs that exist in significant numbers in the
11 national economy that Plaintiff can perform, based on the grids. *Id.* Accordingly,
12 the ALJ found Plaintiff was not disabled. Tr. 30.

13 Plaintiff requested review by the Appeals Council and submitted additional
14 evidence. Tr. 15-16, 503-71. The Appeals Council denied Plaintiff's request for
15 review on November 13, 2012, making the ALJ's decision the Commissioner's
16 final decision for purposes of judicial review. Tr. 1-6; 20 C.F.R. §§ 404.981,
17 416.1484, and 422.210.

18 ISSUES

19 Plaintiff raises three issues for review: 1) whether the ALJ erroneously
20 determined that she did not have a severe mental impairment at step two; 2)

1 whether the ALJ improperly rejected the opinion of her treating physicians; and 3)
2 whether substantial evidence supported the ALJ's conclusions. ECF No. 13 at 6.

3 DISCUSSION

4 **A. Severe Mental Impairment at Step Two**

5 Plaintiff asserts that the ALJ erred in failing to list Plaintiff's mental
6 impairment as severe impairment at step two.

7 Plaintiff seems to misapprehend that a step two finding of a severe
8 impairment does not itself result in a finding of disability. Step two merely screens
9 out groundless claims. *See Smolen v. Chater*, 80 F.3d 1273, 1290 (9th Cir. 1996)
10 (*citing Bowen v. Yuckert*, 482 U.S. 137, 153–54 (1987)). Having passed through
11 the step 2 window, Plaintiff cannot show she was harmed by the Commissioner's
12 step two finding. While styled as a step two challenge, this argument is better
13 addressed to the ALJ's RFC findings as applied at steps four and five. Only then
14 could Plaintiff show the necessary harmful error. *See Lewis v. Astrue*, 498 F.3d
15 909, 911 (9th Cir. 2007) (holding that ALJ's failure to list plaintiff's bursitis as a
16 severe impairment at step two was harmless where ALJ considered limitations
17 caused by the condition at step four).

18 Thus, the Court will proceed to address Plaintiff's argument that the ALJ
19 improperly rejected her treating physicians' opinions, thereby affecting the ALJ's
20 consideration of the remaining steps in the sequential evaluation process.

B. Treating Physicians' Opinions

There are three types of physicians: “(1) those who treat the claimant (treating physicians); (2) those who examine but do not treat the claimant (examining physicians); and (3) those who neither examine nor treat the claimant [but who review the claimant's file] (nonexamining [or reviewing] physicians).” *Holohan v. Massanari*, 246 F.3d 1195, 1201 -1202 (9th Cir. 2001) (citations omitted) (brackets in original). Generally, a treating physician's opinion carries more weight than an examining physician's, and an examining physician's opinion carries more weight than a reviewing physician's. *Id.* In addition, the regulations give more weight to opinions that are explained than to those that are not, and to the opinions of specialists concerning matters relating to their specialty over that of nonspecialists. *Id.* (citations omitted). A physician's opinion may be entitled to little if any weight, when it is an opinion on a matter not related to her or his area of specialization. *Id.* at 1203, n. 2 (citation omitted).

A treating physician's opinions are entitled to substantial weight in social security proceedings. *Bray v. Comm'r of Soc. Sec. Admin.*, 554 F.3d 1219, 1228 (9th Cir. 2009). If a treating or examining physician's opinion is uncontradicted, an ALJ may reject it only by offering “clear and convincing reasons that are supported by substantial evidence.” *Bayliss v. Barnhart*, 427 F.3d 1211, 1216 (9th Cir. 2005). “However, the ALJ need not accept the opinion of any physician,

1 including a treating physician, if that opinion is brief, conclusory and inadequately
2 supported by clinical findings.” *Bray*, 554 F.3d at 1228 (quotation and citation
3 omitted). “If a treating or examining doctor's opinion is contradicted by another
4 doctor's opinion, an ALJ may only reject it by providing specific and legitimate
5 reasons that are supported by substantial evidence.” *Bayliss v. Barnhart*, 427 F.3d
6 at 1216 (citing *Lester v. Chater*, 81 F.3d 821, 830-831 (9th Cir. 1995)). An ALJ
7 may reject a treating physician's opinion if it is based “to a large extent” on a
8 claimant's self-reports that have been properly discounted as incredible.
9 *Tommasetti v. Astrue*, 533 F.3d 1035, 1041 (9th Cir. 2008) (citations omitted).

10 Plaintiff argues that the ALJ failed to provide specific and legitimate reasons
11 or clear and convincing reasons for rejecting Dr. Eastburn’s three separate opinions
12 that Plaintiff was more limited both physically and psychologically than the ALJ
13 determined. ECF No. 13 at 9.

14 The Commissioner concedes “the ALJ erred in rejecting Dr. Eastburn’s
15 opinions in the April 2011 medical source statement [Tr. 373-75] because the ALJ
16 did not explain why he concluded Dr. Eastburn’s opinions were unsupported and
17 contradicted by Plaintiff’s treatment records.” ECF No. 14 at 8. The
18 Commissioner “also concedes that the ALJ erred by not providing reasons to reject
19 Dr. Eastburn’s March 16, 2010 opinion (Tr. 466-68) and December 29, 2010
20 opinion (Tr. 412-14).” ECF No. 14 at 9-10. The Commissioner contends however

1 that the errors are harmless because some of Dr. Eastburn's opinions touched upon
2 ultimate legal issues reserved to the Commissioner, Dr. Eastburn did not explain
3 his opinions with objective medical evidence, and Dr. Eastburn's opinions were
4 contradicted by an examining doctor. *Id.* at 10-12.

5 Irrespective, the ALJ did not explain his reasons for rejecting Dr. Eastburn's
6 April 2011 opinion. That is legal error. The ALJ did not even mention, let alone
7 consider and properly reject Dr. Eastburn's opinions offered in March 2010 and
8 December 2010. That is legal error. This Court cannot weigh the objective
9 medical evidence and determine that Dr. Eastburn's opinions are not supported
10 thereby. Nor can this Court weigh the evidence of the examining physician in
11 order to determine that the ALJ's legal errors are harmless. This Court cannot
12 declare these legal errors "inconsequential to the [ALJ's] ultimate nondisability
13 determination." *Molina*, 674 F.3d at 1115 (quotation and citation omitted). The
14 ALJ failed to consider or properly reject Dr. Eastburn's opinions and a remand is
15 required.

16 **C. Steps Four and Five**

17 Having determined that the ALJ committed legal error, the remaining steps
18 in the sequential evaluation process are affected thereby and a remand is necessary.

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1 Accordingly, **IT IS HEREBY ORDERED:**

2 1. Plaintiff's Motion for Summary Judgment (ECF No. 13) is **GRANTED**.

3 2. Defendant's Motion for Summary Judgment (ECF No. 14) is **DENIED**.

4 3. Pursuant to sentence four of 42 U.S.C. § 405(g), this action is

5 REVERSED and REMANDED to the Commissioner for further

6 proceedings consistent with this Order.

7 The District Court Executive is hereby directed to file this Order, enter
8 Judgment for Plaintiff, provide copies to counsel, and **CLOSE** the file.

9 **DATED** March 17, 2014.



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A handwritten signature in blue ink that reads "Thomas O. Rice".

THOMAS O. RICE
United States District Judge